No. 82-940

Supreme Court, U.S.
FILED
MAY 10 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON, PETITIONER

v.

KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JAMES W. CLUTE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

JUDY TRENT ELLIS
Attorney

Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTION PRESENTED

Whether a law firm organized as a partnership violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), if one of the associates in its employ is denied, on the basis of her sex, an equal opportunity to be considered for admission to the partnership.

TABLE OF CONTENTS

Page

Interest of the United States and the Equal Employment Opportunity Commission 1

Statement 1

Summary of argument 4

Argument:

Title VII prohibits respondent from discriminating on the basis of sex in admitting its associates to partnership 7

A. The opportunity to be admitted to the partnership was a term, condition, and privilege of petitioner's employment as an associate; respondent therefore had to consider her for admission on a non-discriminatory basis 7

B. Decisions concerning the selection of partners are not insulated from the prohibitions of Title VII 13

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 12

Allied Chemical & Alkali Workers, Local No. 1 v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 ..... 5, 8-9

Bartmess v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, cert. denied, 404 U.S. 939 12

Page

Cases—Continued:

Buckley v. *Valeo*, 424 U.S. 1 15

Chastang v. *Flynn & Emrich Co.*, 541 F.2d 1040 12

City of Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 12

County of Washington v. *Gunther*, 452 U.S. 161 16

Democratic Party of the United States v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 15

East Texas Motor Freight System, Inc. v. *Rodriguez*, 431 U.S. 395 13

EEOC v. *Rinella & Rinella*, 401 F. Supp. 175 8

Ford Motor Co. v. *NLRB*, 441 U.S. 488 ..... 8, 11

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 8

General Electric Co. v. *Gilbert*, 429 U.S. 125 11

Goldberg v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 11

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 8, 13

Kunda v. *Muhlenberg College*, 621 F.2d 532 17

Lieberman v. *Gant*, 630 F.2d 60 17

Page

Cases—Continued:

Lucido v. *Cravath, Swaine & Moore*, 425 F. Supp. 123 8

NAACP v. *Alabama*, 357 U.S. 449 15

NAACP v. *Button*, 371 U.S. 415 15

NLRB v. *Borg-Warner Corp.*, 356 U.S. 342 9

Nashville Gas Co. v. *Satty*, 434 U.S. 136 13

Norwood v. *Harrison*, 413 U.S. 455 15

Peters v. *Missouri-Pacific R.R.*, 483 F.2d 490, cert. denied, 414 U.S. 1002 12

Railway Mail Ass'n v. *Corsi*, 326 U.S. 88 15

Rosen v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 12

Runyon v. *McCrary*, 427 U.S. 160 15

Taylor v. *Teletype Corp.*, 648 F.2d 1129, cert. denied, 454 U.S. 969 12

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. V) 2000e *et seq.* 1, 2

Section 701(a), 42 U.S.C. (Supp. V) 2000e(a) 7
Section 701(b), 42 U.S.C. 2000e(b) 7, 16
Section 701(b)(2), 42 U.S.C. 2000e(b)(2) 15
Section 702, 42 U.S.C. 2000e-1 16
Section 703(a), 42 U.S.C. 2000e-2(a) 14, 15, 16

Page

Statutes—Continued:

Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1) 5, 6, 7
Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2) 6, 12, 13, 14

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (amending 42 U.S.C. (1970 ed.) 2000e-1) 16

National Labor Relations Act, 29 U.S.C. 158(d) 8

Miscellaneous:

110 Cong. Rec. (1964):

p. 7213 ..... 5, 8, 11
p. 12618 8
p. 12723 10
p. 13088 16

118 Cong. Rec. (1972):

p. 1970 18
p. 1992 16
p. 3800 17
pp. 3800-3801 17
pp. 3801-3802 17
p. 3803 18

H.R Rep. No. 914 (Pt. 2), 88th Cong., 1st Sess. (1963) 15

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) 16-17

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 17

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-940

ELIZABETH ANDERSON HISHON, PETITIONER

v.

KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The United States and the Equal Employment Opportunity Commission share responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* This case presents an important question concerning the coverage of Title VII. Its resolution will affect the Commission's powers to enforce Title VII against private employers, and the Court's analysis of the issues may also affect the ability of the United States to enforce Title VII.

STATEMENT

1. Petitioner is a woman attorney; respondent is a law firm consisting of approximately 50 partners. Respondent employs approximately 50 attorneys as associates. Respondent hired petitioner as an associate in 1972, shortly

after she graduated from law school. At the time this suit was brought, no woman had ever been a partner of respondent. Pet. App. A2; J.A. 6-7, 30.

According to petitioner's complaint, the allegations of which are to be accepted as true, respondent represented to petitioner and "to other law students, and young lawyers whom the firm was seeking to employ" that respondent would hire them as associates "with the expectation that the associate lawyer will be promoted and become a partner in the * * * firm on a fair and equal basis and within a reasonable period of time" (J.A. 8-9). Respondent further represented that "[a]ssociates who receive satisfactory evaluations from the firm will be promoted and made partners in the firm as a matter of course after [a] five or six year period of apprenticeship." *Id.* at 9. Petitioner alleged that she accepted employment with respondent in "reliance upon the[se] representations and assurances" (*ibid.*).

In May 1978, approximately five and one-half years after petitioner was hired, respondent purported to consider petitioner for partnership, but decided not to make her a partner. One year later, petitioner was again refused an invitation to partnership. Petitioner was advised that, under the firm's "up or out" policy, her employment as an associate would be terminated at the end of 1979. Pet. App. A2-A3; J.A. 12-13

2. Petitioner then filed a charge with the Equal Employment Opportunity Commission (J.A. 17-22), claiming that respondent had discriminated against her because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* The Commission issued a notice of right to sue (J.A. 24-25), and petitioner brought this action in the United States District Court for the Northern District of Georgia, challenging both the decision

not to invite her to join the partnership and her discharge. She sought declaratory and injunctive relief, back pay, and compensatory damages "in lieu of reinstatement and promotion to partnership" (*id.* at 15-16).

The district court dismissed the complaint, ruling that petitioner had failed to state a claim under Title VII. Pet. App. A17-A25. The district court appeared to conclude that the partners of a law firm have a "constitutional right to freedom of association" that would be violated if they were required not to discriminate on the basis of race or sex in choosing partners from among their associates. *Id.* at A24. The district court stated that respondent's "right * * * to freedom of association seems clear," whereas it is not clear whether Title VII was intended to apply to the selection of a partner. *Ibid.* The court accordingly held that it would not interpret Title VII to reach petitioner's claim. *Id.* at A18.

A divided court of appeals affirmed. Pet. App. A1-A16. The majority did not purport to find that respondent had a constitutional right that would be violated by the application of Title VII. Instead, the majority concluded (*id.* at A6): "Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association."

The majority first considered the contention that respondent's partners should be viewed as "employees" for Title VII purposes, so that discrimination in the selection of a partner would necessarily be employment discrimination prohibited by Title VII. The majority rejected this contention on the ground that respondent's "partners own the partnership; they are not its 'employees' under Title VII." Pet. App. A10. The majority then considered petitioner's narrower contention that the opportunity to be admitted to the partnership was a term or condition of her employment

as an associate, so that discrimination in selecting partners from among the associates would violate Title VII. The majority said that it had "no quarrel with the premise" (*id.* at A11) that Title VII may prohibit an employer from discriminating among its employees with respect to opportunities for advancement to other positions, even if those positions are not themselves covered by Title VII. But in this case, the majority said, applying Title VII to the decision challenged by petitioner would require "encroaching upon individuals' decisions to voluntarily associate in a business partnership." *Ibid.* The majority accordingly concluded that "[d]ecisions as to who will be partners are not within the protection of Title VII." *Id.* at A13.

Judge Tjoflat dissented. He noted that, in view of the "up or out" policy, the challenged decision was a decision both to refuse petitioner a partnership and to discharge her. Pet. App. A15. Judge Tjoflat stated that he would "agree that Title VII would not apply to the discrete decision whether to take on a new partner." *Id.* at A16 (footnote omitted). But, he added, "when the partnership decision inextricably and inevitably is a decision whether to terminate employment, I would hold tnat Title VII applies." *Ibid.* (emphasis omitted).

SUMMARY OF ARGUMENT

The plain language of Title VII prohibits employers — including law firms — from treating male employees better than equally qualified female employees. Whatever the status of partners under Title VII, it is undisputed that a law firm's associates are its employees. Therefore, the terms of Title VII prohibit a law firm from discriminating among its associates on the basis of sex when it considers them for advancement, including advancement to partnership. The contrary decisions of the district court and court of appeals were based on the conclusion that decisions pertaining to partnerships are simply exempt from the normal operations

of Title VII. Neither the statute nor its legislative history provides any basis for creating such an exemption.

A. 1. Section 703(a)(1) of Title VII makes it unlawful for "an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *." 42 U.S.C. 2000e-2(a)(1). There is no dispute that the relationship between respondent and its associates is one of "employment." The only remaining question is whether the opportunity to be admitted to partnership was a "term, condition, or privilege" of petitioner's employment as an associate.

We submit that the answer is clearly "yes." The statutory language seeks to prohibit all discrimination "in connection with employment" (110 Cong. Rec. 7213 (1964)) and to reach everything that is "an aspect of the relationship between the employer and employees" (*Allied Chemical & Alkali Workers, Local No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). The prospect of advancement is a critical element in most employment relationships; the relationship between associates and law firms is no exception. The opportunity to become a partner is crucial to a young lawyer's decision whether to accept employment as an associate with a firm that recruits partners from among its associates. It is also vital to the firm's efforts to attract young associates from whom it will select its partners in the future. The prospect of becoming a partner remains a central preoccupation of both the firm and the associate during the associate's period of employment. An associate's professional development is both shaped and evaluated with the prospect of advancement to partnership in mind. In view of the pervasive influence that the opportunity to become a partner has on the associate's choice of a firm, the firm's ability to recruit associates, and the associates'

working lives, it is difficult to imagine a more obvious aspect of "compensation, terms, conditions, or privileges of employment."

Whether partners are themselves employees is immaterial; the phrase "compensation, terms, conditions, or privileges" of employment comprises many elements that do not themselves constitute employment. It is also immaterial that advancement to partnership occurs just as the associate's employment as an associate is ending; such things as pensions and severance pay take effect only when employment is completed, but they are undoubtedly "compensation, terms, conditions, or privileges of employment."

2. A law firm that discriminates on the basis of sex in affording its associates the opportunity for admission to partnership also violates Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2). Such discrimination "adversely affect[s] * * * [an associate's] status as an employee" and "deprive[s] * * * [the associate] of employment opportunities."

B. Neither the court of appeals nor the district court denied that discrimination in affording associates the opportunity to advance to partnership violates the prohibitions of Sections 703(a)(1) and (2). Instead, the courts below concluded that a law firm's decisions about who is to become a partner somehow constitute a protected enclave in which the plain language of Title VII does not apply. Nothing in the statute or its legislative history supports this notion. Congress did enact certain explicit exceptions to Title VII; those exceptions carefully delimit the area in which Congress wished to protect associational interests from the coverage of Title VII. In fact, Congress specifically considered whether Title VII should apply to "sensitive" decisions about associations among professionals, and made unequivocally clear its determination that Title VII should apply to such decisions.

ARGUMENT

TITLE VII PROHIBITS RESPONDENT FROM DISCRIMINATING ON THE BASIS OF SEX IN ADMITTING ITS ASSOCIATES TO PARTNERSHIP

A. The Opportunity To Be Admitted to the Partnership Was a Term, Condition, and Privilege of Petitioner's Employment as an Associate; Respondent Therefore Had to Consider Her for Admission on a Nondiscriminatory Basis

1. a. Section 703(a)(1) of Title VII makes it unlawful for "an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *." 42 U.S.C. 2000e-2(a)(1). Petitioner alleged that respondent discriminatorily denied her an equal opportunity to advance to partnership because of her sex—a straightforward and simple claim of disparate treatment. So far as the language of Section 703(a)(1) is concerned, petitioner has stated a claim under Title VII if the opportunity to be advanced to partnership was one of the "terms, conditions, or privileges" of her "employment" as an associate.

Whatever the relationship between respondent and its partners, there is no dispute that the relationship between respondent and its associates was and is one of "employment."[1] Neither the district court nor the court of appeals suggested otherwise; indeed, respondent appears to have conceded in the court of appeals that it employed its associates. Resp. C.A. Br. 23. As an associate, petitioner worked

---

[1] A partnership is explicitly included among those entities capable of being an "employer" under Title VII. 42 U.S.C. (Supp. V) 2000e(a) and 42 U.S.C. 2000e(b).

for a salary and had no ownership interest or management role in the firm. See also *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123, 127 (S.D.N.Y. 1977); *EEOC* v. *Rinella & Rinella*, 401 F. Supp. 175, 179-181 (N.D. Ill. 1975).

The further question is whether the opportunity to be admitted to the partnership was one of the "terms, conditions, or privileges" of petitioner's employment. We submit that there can be no doubt that the answer is "yes."

Neither Title VII itself nor its legislative history specifically defines "compensation, terms, conditions, or privileges of employment"; but the obvious and cumulative breadth of the statutory phrase makes it clear that Congress wished to insulate against discrimination *all* aspects and incidents of the employment relationship. As the "authoritative" (*International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977)) memorandum submitted by the Senate floor managers of the proposed legislation that became Title VII explained, Title VII broadly prohibits discrimination "in connection with employment" (110 Cong. Rec. 7213 (1964)). Moreover, the comparable phrase "terms and conditions of employment" in the National Labor Relations Act, 29 U.S.C. 158(d) — which was in many respects the model for Title VII[2] — includes everything that is "an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali*

---

[2]See generally *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976). Congress used the "terms and conditions" language in Title VII for the same reason that it used it in the NLRA — because it is impractical to list every aspect of the employment relationship that might come to be at issue. Compare 110 Cong. Rec. 12618 (1964) (remarks of Sen. Muskie) with *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495-496 (1979). Indeed, if anything, Congress, by adding "privileges" of employment, broadened the NLRA concept when it enacted Title VII.

Workers, Local No. 1 v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971), citing *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 350 (1958).

To say that the prospect for advancement to partnership is "an aspect of the relationship" between the associate and a law firm is an understatement. The possibility of admission to the firm is the central element in this employment relationship, of critical importance to both the associate and the firm. Petitioner's allegations must be taken to show — and respondent cannot plausibly deny — that the prospect of becoming a partner is crucial to a young lawyer's decision whether to accept employment as an associate of a particular firm. For the firm, the opportunity of admission to the partnership is a vital inducement in attracting young associates to the firm; and it is these associates who will, in turn, constitute the pool from which the partnership will select its new members. In fact, a partner who supervised associates during the period when petitioner worked for the firm stated, in an affidavit submitted in respondent's behalf, that "most of the lawyers considered for partnership are considered after having joined the firm following law school or judicial clerkships and after working at the firm as an associate for a number of years." J.A. 45.

Once associates join a firm, their tenure as associates in many ways constitutes an apprenticeship for partnership. Their work is evaluated primarily to determine whether they will qualify to become partners. Respondent's "up or out" policy (J.A. 32-33, 48) shows that an associate who is not a potential partner has no place in the firm. Thus the opportunity to become a partner, and the firm's consideration of the associate for partnership, shape the entire relationship between the firm and its employee.

Respondent's own statements again demonstrate these points. Respondent said in its answer that "all associates are employed with the expectation that they will be considered

for invitation to partnership on a fair and equal basis within a reasonable period of time if they meet the firm's standards for partnership" (J.A. 30-31). Partners of respondent who supervised associates explained in affidavits that associates are evaluated each year by the firm, and that these evaluations are intended both to guide the associates' professional development and to assess their suitability for partnership. *Id.* at 46-47; see *id.* at 51-52. For example, petitioner was allegedly told "at the end of her fourth year * * * that she was making progress, but that additional progress would have to be made for her to be considered for a partner." *Id.* at 52.

In sum, the opportunity to become a partner is held out to associates by respondent and other major law firms as a privilege of employment that makes joining the firm more attractive. Reciprocally, partnership opportunities are considered by associates as an important term of their employment and an incentive to work for the firm. And once associates are employed at a firm, the prospect of partnership has a pervasive effect on the conditions of their working lives; it dictates the course of their development, and it provides the standard against which they are measured. It is difficult to imagine a more obvious aspect of "compensation, terms, conditions, or privileges of employment."

The fundamental and simple point here is that Title VII forbids law firms to treat male employees better than female employees on account of sex. Thus, once a firm adopts a practice of elevating its employees (associates) to partnership — whether or not as a matter of express policy or agreement — it may not treat male associates better than female associates with respect to this possibility of advancement. It may not use a two-track, discriminatory advancement system. If respondent discriminated against its women associates in providing dining or recreational facilities, it would violate Title VII. See 110 Cong. Rec. 12723 (1964)

(remarks of Sen. Humphrey) (Title VII prohibits discrimination in "pay, conditions, or facilities"); cf. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488 (1979). A Congress that sought to outlaw discrimination "in connection with employment" (110 Cong. Rec. 7213 (1964)) could not have intended to prohibit discrimination with respect to such matters while permitting discrimination with respect to the opportunity for advancement that is, in this employment relationship, the central preoccupation of both the employer and the employee.

b. It is no answer to say that partners are not themselves employees. The court of appeals and the district court discussed in detail the question whether partners are employees for Title VII purposes (Pet. App. A8-A10, A17-A19, A22-A23), but that question is immaterial to the issue whether an opportunity to advance to partnership is a term, condition, or privilege of an *associate's* employment.[3] "[T]erms, conditions, or privileges" of employment are made up of many elements that do not themselves constitute "employment" and are therefore not directly covered by Title VII. For example, Title VII does not directly forbid discrimination in providing health or disability insurance. But if employers provide such insurance to their employees, they cannot discriminate on the basis of race or sex in doing so. See, *e.g.*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976).

---

[3]We believe that this case can and should be disposed of on the ground that where, as shown in this case, the opportunity to become a partner is a term, condition, or privilege of an associate's employment, Title VII is violated if that associate is denied that opportunity on the basis of sex. There is therefore no need in this case to consider the broader question whether and under what circumstances a partner might be viewed as an "employee" of the partnership for Title VII purposes. Cf. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961).

Similarly, it is immaterial that advancement to partnership occurs just as an associate's employment as an associate is completed. It is well settled that pensions are a term or condition of employment under Title VII. See, *e.g.*, *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040, 1042 (4th Cir. 1976); *Peters* v. *Missouri-Pacific R.R.*, 483 F.2d 490, 492 n.3 (5th Cir.), cert. denied, 414 U.S. 1002 (1973); *Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90, 94-95 (3d Cir. 1973); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188 (7th Cir.), cert. denied, 404 U.S. 939 (1971). See also *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). If respondent had a practice of hiring paralegals for a single term of a few years and paying severance bonuses based on merit, it surely could not discriminate on the basis of race or sex in deciding who was to receive the bonuses; discrimination in considering associates for partnership is indistinguishable.[4]

2. Discrimination on the basis of sex in the selection of associates to be partners also violates Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2). That provision makes it unlawful for "an employer * * * to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *." The prospect of becoming a partner is an integral aspect of an associate's "status as an employee." If a law firm adopted an explicit

---

[4]This case involves no questions of relief. We note that petitioner apparently does not seek to be made a partner (J.A. 16) and that this Court has held that the district courts retain discretion in fashioning equitable relief. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). See also *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir.), cert. denied, 454 U.S. 969 (1981).

policy that only male associates could be considered for partnership, or that female associates would have to meet more exacting standards, it would undoubtedly have limited and classified its employees in a way that adversely affected women associates' status as employees. Similarly, as even the court of appeals acknowledged (Pet. App. A11; see also *id.* at A23), an "employment opportunity" within the meaning of Section 703(a)(2) need not be an opportunity for further employment; it can be an opportunity associated with employment.

It is true that petitioner principally alleged discrimination only against herself — although her complaint does also claim that respondent had "an established custom, practice and policy" of discriminating against women in selecting partners (J.A. 11; see also *id.* at 13) — and the language of Section 703(a)(2) can be more readily applied to employment decisions that affect entire categories of employees. See, *e.g., Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977). But there is no reason to believe that Congress intended to require a plaintiff seeking to recover under Section 703(a)(2) to bring a class action or to prove discrimination against others besides herself. Discrimination on the basis of the criteria enumerated in Title VII is, by its very nature, discrimination that tends to "classify" or "limit" individuals on the basis of their membership in a group. See *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405 (1977). Cf. *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 359 & n.45.

B. Decisions Concerning the Selection of Partners Are Not Insulated from the Prohibitions of Title VII

Neither the court of appeals nor the district court denied that the opportunity to be considered for partnership is a term, condition, or privilege of an associate's employment. Nor did the courts below deny that if a firm discriminated

against women when considering associates for admission to partnership, this would deprive an associate of "employment opportunities" and "adversely affect" the associate's "status as an employee." Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2). But the courts nonetheless concluded that petitioner did not state a claim under Title VII because they believed that the prohibitions of Title VII simply do not apply to decisions about whom to admit to partnership. As the court of appeals put it, "[d]ecisions as to who will be partners are not within the protection of Title VII." Pet. App. A13.

The court of appeals and the district court failed to cite a single provision in Title VII, or a single line from its legislative history, to support this notion. There is no basis for the conclusion that decisions relating to the composition of a partnership are somehow a specially protected enclave in which the plain language of Title VII does not apply. No provision of Title VII specifies special treatment for law firms or partnerships. And nothing in the legislative history suggests that the prohibitions of Section 703(a) do not apply, in accordance with their language, where a firm discriminates against a woman associate with respect to a matter — such as admission to the partnership — which is clearly a term, condition, or privilege of employment. The court of appeals repeatedly emphasized "the essence of a partnership — voluntary association." Pet. App. A2; see *id.* at A6, A10, A11. But all employment relationships are the result of voluntary associations, and many of the most conventional forms of employer-employee relationships can involve relatively intimate associations.

In fact, there is strong evidence that Congress intended Title VII to apply, in accordance with its terms, to decisions comparable to a law firm's selection of partners from

among its associates.[5] Where Congress wanted to afford special protection to a particular sort of association, it did so explicitly in the statute itself.[6] For example, certain bona fide private membership clubs are exempt from Section 703(a). 42 U.S.C. 2000e(b)(2). Title VII explicitly does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of

---

[5]See generally H.R. Rep. No. 914 (Pt. 2), 88th Cong., 1st Sess. 29 (1963) (separate views of Rep. McCulloch and others) (envisioning that Title VII would apply to "teachers, doctors, lawyers, scientists, and engineers").

[6]The district court plainly erred in making the suggestion—abandoned by the court of appeals — that the Constitution might bar applying Title VII to respondent's choice of partners from among its associates. The constitutionally protected freedom of association is, of course, not a freedom to associate — or to refuse to associate — in any capacity with whomever one chooses. Governments impose a variety of constraints, of unquestioned constitutionality, on business associations. Indeed, state and local governments preclude large numbers of persons — such as all those who are not members of the bar — from joining respondent in the practice of law; there is no reason to believe that precluding a person from joining an association is any less of an invasion of associational rights than prohibiting the association from discriminating in choosing members.

In general, "group association is protected because it enhances '[e]ffective advocacy.' " *Buckley* v. *Valeo*, 424 U.S. 1, 65 (1976), quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). See also *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 121 (1981) (the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs"). Associations of lawyers can, of course, be protected from interference with their efforts to engage in activities protected by the First Amendment. See, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963). But there has been no suggestion in this case that respondent's ability to advance political views will be hampered if it must accept as partners qualified women and minority associates. See also *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."); *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976); *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 93-94 (1945).

individuals of a particular religion to perform work connected with the carrying on by such [organization] * * * of its activities." 42 U.S.C. 2000e-1. Also, employers with fewer than a certain number of employees — generally 15 —are not subject to Section 703(a) (42 U.S.C. 2000e(b)), and the legislative history suggests that Congress believed this exception would fully protect individuals' interests in private association. See 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) (when firms employ more than the threshold number, they "lose most of whatever intimate, personal character they might have had"). Thus a law firm that employed fewer than 15 persons could not be subject to Section 703(a). But in view of Congress's carefully drafted explicit exceptions, there is no warrant for creating an additional, implicit exception to the act. See *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981) ("We must * * * avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.").

In addition, in 1972, when Congress comprehensively amended Title VII, it directly confronted the issues that arise in applying Title VII to decisions as sensitive as the decision whether to admit an associate to partnership in a law firm. Congress made clear its determination that Title VII apply in such instances. First, Congress extended Title VII to educational institutions, which had been exempt.[7] In doing so, Congress could not have been unaware that its action would affect selections to many tenured positions. Congress's particular concern was with higher education, and especially with "major faculty positions" in institutions of higher education (118 Cong. Rec. 1992 (1972) (remarks of Sen. Williams); see H.R. Rep. No. 92-238, 92d Cong., 1st

---

[7]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (amending 42 U.S.C. (1970 ed.) 2000e-1).

Sess. 19-20 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 11-12 (1971)), and it is now well established that Title VII applies to universities' tenure decisions. See, *e.g., Lieberman* v. *Gant*, 630 F.2d 60 (2d Cir. 1980); *Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Congress's willingness to remove an explicit exemption for a category of decisions — selections to tenured positions in a community of scholars and educators — that are surely as sensitive as a law firm's choice of partners rebuts the contention that the courts should create an exemption for partnerships that Congress never enacted.

Second, in 1972 Congress rejected a proposed amendment to Title VII that would have exempted "the employment of physicians or surgeons by public or private hospitals" (118 Cong. Rec. 3800 (1972)). Senator Williams, speaking in opposition to the amendment, said (118 Cong. Rec. 3800-3801 (1972)):

> [The proposed amendment] goes to some fundamental principles. * * * I think that we would be stepping back 100 years. * * * * * We have seen, during the course of debate * * *, that minorities and women have been, and continue to be, denied access to high-level and professional job categories. * * * * * This amendment stands out among all those proposed as representing exactly the opposite of what we should be doing in this country, which is opening up opportunities for everyone.

Senator Javits opposed the amendment in similar terms (118 Cong. Rec. 3801-3802 (1972)):

> [T]his amendment is so completely regressive that it does not just try to undo what is in this bill, but it tries to undo what we did in the bill passed 8 years ago, in 1964. That is what the amendment is directed to. It

proposes to undo a measure we enacted in 1964, about which we have heard no complaints. * * *

* * * * *

One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue collar jobs and ditchdigging jobs are reserved for them; and that * * * they cannot ascend the higher rungs in professional and other life.

* * * * *

[T]his amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion — just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain — and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

This would be most iniquitous. I simply cannot believe that in this year it would be seriously entertained as a possibility by way of exemption from this bill.

I hope very much, almost in self-respect, that the Senate will decisively reject this amendment.

Senators Williams and Javits were floor managers of the 1972 revision of Title VII (118 Cong. Rec. 1970 (1972)), and the amendment exempting physicians was rejected immediately after they spoke. 118 Cong. Rec. 3803 (1972). Their remarks clearly show that Congress intended the statute to apply to professional jobs where people work together as closely as partners in a law firm, and where the choice of an

individual for a position is as sensitive as the choice of a partner from among associates.[8]

It is clear, therefore, that Congress did not intend to create a special enclave for law partnerships within which they are free to discriminate against their employees with respect to the "terms, conditions, or privileges of employment." The case returns, then, to its simple and straightforward essence. Petitioner, an employee of respondent, alleged that respondent discriminated against her with respect to a critical term, condition, and privilege of her employment: her opportunity for advancement to partnership in the firm. It is a central purpose of Title VII to prohibit such discrimination, and we ask this Court to so hold.

---

[8]This case does not call for a decision whether and under what circumstances a law firm can so structure its selection of partners that the opportunity for partnership would not be a term, condition, or privilege of the employment of its associates. It is not difficult to predict, however, that a firm that wholly divorced its partnership selection process from its relationship with its associates would have enormous difficulty in attracting associates to join it — and this shows yet again that, in the real world, the opportunity to advance to partnership is a critical element of the employment relationship.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

PAUL M. BATOR
Deputy Solictor General

DAVID A. STRAUSS
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JAMES W. CLUTE
Attorneys

DAVID L. SLATE
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

JUDY TRENT ELLIS
Attorney
Equal Employment Opportunity Commission

MAY 1983

DOJ-1983-05